

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
2 Including Professional Corporations
SASCHA HENRY, Cal. Bar No. 191914
3 JONATHAN D. MOSS, Cal. Bar No. 252376
shenry@sheppardmullin.com
4 jmos@sheppardmullin.com
333 South Hope Street, 43rd Floor
5 Los Angeles, CA 90071-1422
Telephone: 213.620.1780
6 Facsimile: 213.620.1398

7 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
8 Including Professional Corporations
ABBY H. MEYER, Cal. Bar No. 294947
9 ameyer@sheppardmullin.com
650 Town Center Drive, Fourth Floor
10 Costa Mesa, CA 92626-1993
Telephone: 714.513.5100
11 Facsimile: 714.513.5130

12 Attorneys for Defendant Younique, LLC

13
14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

16 MEGAN SCHMITT, DEANA
17 REILLY, CAROL ORLOWSKY, and
STEPHANIE MILLER BRUN,
18 individually and on behalf of
themselves and all others similarly
19 situated,

20 Plaintiffs,

21 v.

22 YOUNIQUE, LLC

23 Defendant.

Case No. 8:17-cv-01397-JVS-JDE

**DEFENDANT YOUNIQUE, LLC'S
EX PARTE APPLICATION TO
POSTPONE ENFORCEMENT OF
THE COURT'S ORDER
GRANTING LEAVE TO
DISSEMINATE CLASS NOTICE
(DKT. 191)**

The Hon. James V. Selna
Santa Ana, Courtroom 10C

SAC filed: January 4, 2018

24
25
26 **[PUBLIC REDACTED VERSION]**
27
28

EX PARTE APPLICATION

Pursuant to Local Rule 7-19, Defendant Younique, LLC hereby applies *ex parte* for an order to postpone enforcement of the Court's February 5, 2019 Order granting Plaintiffs leave to disseminate class notice (Dkt. 191). Younique makes this motion on the ground that its Motion to Exclude Donald May, Ph.D., which has been fully briefed, (Dkts. 146, 154-2, 166) should first be heard and ruled upon. Younique moved to exclude May's Rule 26 report on the grounds that it was served four-months late on December 12, 2018, that Plaintiffs have unwaveringly refused to produce the facts and data supporting the regression models that May prepared, and that the Rule 26 report's [REDACTED] (called an R square) indicated the models were unreliable. (Dkts. 146 and 166.)

If the Court were to grant Younique's motion to exclude May, the issue of whether and how to disseminate notice of class certification would be rendered moot. In addition, Younique has filed a petition for permission to appeal the Court's order certifying the class, and the Court of Appeals has not yet ruled.

It is appropriate to delay the giving of class notice until the class certification issues are resolved. *Tschudy v. J.C. Penney, Inc.*, 2015 WL 5098446, *6 (S.D. Cal. Aug. 28, 2015) (denying motion for leave to give class notice because class issues were not yet settled) (citing 7AA Wright et al., Federal Practice and Procedure § 1788 (3d ed.) and Rubenstein, Newberg on Class Actions § 8:11 (5th ed.)).

Younique's counsel has made reasonable, good faith efforts to advise Plaintiffs' counsel of the date and substance of this *ex parte* application. (Henry Decl., ¶ 7.) After orally communicating with Plaintiffs' counsel, Plaintiffs' counsel advised that they plan to oppose the instant application. (*Id.*) The name, address, telephone number and e-mail address of Plaintiffs' counsel is:

Adam Gonnelli
The Sultzer Law Group P.C.
280 Highway 35, Suite 304
Red Bank, NJ 07701

1 Phone: (845) 483-7100
2 Gonnellia@thesultzerlawgroup.com

3 Bonner Walsh
4 Walsh, PLLC
5 1561 Long Haul Road
6 Grangeville, ID 83530
7 Phone: (541) 359-2827
8 bonner@walshpllc.com

9 Alison Bernal
10 Nye, Stirling, Hale & Miller, LLP
11 33 West Mission Street, Suite 201
12 Santa Barbara, CA 93101
13 Phone: (805) 963-2345
14 alison@nps-law.com

15 Younique notified Plaintiffs' counsel that any opposing papers must be filed
16 not later than twenty-four (24) hours following electronic service of the *ex parte*
17 application through the Court's ECF system.

18 In preparing this application, Younique has reviewed the Court's Initial Order
19 regarding *ex parte* applications, the Local Rules, as well as *Mission Power*
20 *Engineering Co. v. Continental Casualty Co.*, 883 F. Supp. 488 (C.D. Cal. 1995),
21 and respectfully submits that *ex parte* relief is warranted for the reasons set forth
22 below.

23 Dated: February 6, 2019

24 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

25 By

26 /s/ Abby H. Meyer

27 SASCHA HENRY

28 JONATHAN D. MOSS

ABBY H. MEYER

Attorneys for Defendant Younique, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The parties have fully briefed a possibly case-dispositive motion that could render notice to the class members unnecessary: Younique's motion *in limine* to exclude Plaintiffs' damages expert, Donald May, Ph.D. (Dkt. 146 (motion); 154-2 (opposition); 166-1 (reply).) Younique diligently met the dates set out in the Courts' scheduling orders and timely filed its motion to exclude May on January 7, 2019. The motion was scheduled to be heard at the pretrial conference on February 4, 2019. On January 30, Plaintiffs filed a motion for leave to disseminate class notice. The following day, the Court vacated the pretrial conference, which took Younique's motion to exclude off calendar. Although Younique had until February 11 to oppose Plaintiffs' motion for leave to disseminate class notice, the Court granted Plaintiffs' motion on February 5 (yesterday) and ordered Younique to produce class member contact information within 10 days. (Dkt. 191 ("Order").)

Younique respectfully requests that the Court postpone enforcement of its Order until Younique's motion to exclude May is heard and ruled upon. Younique moved to exclude May on three grounds:

- Plaintiffs produced May's Rule 26 report on December 12, 2018, over four months after it was ordered to be produced. (Dkt. 146; Henry Decl., ¶ 5.)
- Plaintiffs and May refused to produce the underlying facts and data on which May's opinions are based in violation of Rule 26(a)(1) and (a)(2), steadfastly contending that Younique is not entitled to it. (Dkt. 146 and 154-2; Henry Decl., ¶ 5.)
- Plaintiffs' and May's withholding of the underlying facts and data is particularly egregious because May offers regression models to opine as to classwide damages, and yet admits that those regression

1 models [REDACTED]
2 [REDACTED]

3 Sending notice to the class should be postponed given May's [REDACTED]
4 that his models do not explain swaths of the pricing data, Plaintiffs produced May's
5 report four months late and they refuse to turn over the underlying facts and data.
6 Disseminating class notice under these circumstances is premature and would
7 irreparably damage Younique's customer relationships.

8 **II. RELEVANT BACKGROUND**

9 On December 11, 2017, the Court entered scheduling orders in this matter.
10 (Dkt. 56, 56-1.)

11 On August 1, 2018, Plaintiffs moved for class certification and served a
12 declaration of Donald May, Ph.D. ("May"). The declaration did not contain any
13 opinions as to the Plaintiffs' alleged damages, but rather May's *proposals* for
14 possible damages models. (Dkt. 80-2.) On November 5, 2018, Plaintiffs filed a
15 reply brief in support of class certification, which included a "supplemental
16 declaration" of May. (Dkt. 117-3.) The supplemental declaration responded to
17 Younique's and its expert's criticisms of the proposed damages models, but did not
18 include any opinions as to the plaintiffs' individual damages or of classwide
19 damages.

20 Recognizing that the expert discovery cut-off was December 15, 2018, on
21 November 8, 2018, Younique reached out to Plaintiffs' counsel to schedule May's
22 deposition. (Henry Decl., ¶ 4.) Following a period of silence from Plaintiffs'
23 counsel, ultimately May's deposition was set for December 12. (*Id.*) Younique then
24 served a deposition subpoena which included requests for all documents that May
25 considered or relied on in forming his opinions; all documents that constitute or
26 refer to his calculations; and his work files, among other categories. (Henry Decl., ¶
27 4 and Ex. B thereto.) Plaintiffs' counsel accepted service of the subpoena. (Henry
28 Decl., ¶ 4.)

1 On December 12, 2018, two hours before May's deposition was set to begin
 2 (8:00 a.m.), Plaintiffs served May's Rule 26 report which, for the first time, revealed
 3 May's opinions for three classwide damages models. (Henry Decl., ¶ 5.) Plaintiffs'
 4 counsel had not informed Younique's counsel in advance of their plan to serve the
 5 Report, nor had they moved to modify the scheduling order to permit the late
 6 disclosure. (*Id.*) Moreover, May did not produce (and has not produced) the
 7 underlying facts and data supporting his three models. (*Id.*) Younique met and
 8 conferred with Plaintiffs' counsel about excluding May. (Henry Decl., ¶ 6.)

9 On January 7, 2019, Younique filed a motion *in limine* to exclude May. (Dkt.
 10 146.) Several weeks before January 7, expert discovery had closed and the motion
 11 cut-off had passed. (Dkt. 56-1.) January 7 was the last day on which motions *in*
 12 *limine* could be filed. The motion has now been fully briefed. (Dkt. 154-2
 13 (Plaintiffs' opposition); 166-1 (Younique's reply).)

14 On January 29, 2019, the parties filed the pretrial conference papers. (Dkt.
 15 179 to 183.) On January 30, 2019, Plaintiffs filed a motion to adjourn the trial date
 16 and for leave to give notice of the certified classes. (Dkt. 186-1.) On January 31,
 17 2019, the Court *sua sponte* entered an order vacating the pretrial conference
 18 scheduled for February 4, 2019. (Dkt. 188.) This had the effect of taking
 19 Younique's motion *in limine* to exclude May off of the Court's February 4, 2019
 20 calendar. (*See* Dkt. 57, p. 5.) On February 5, 2019, six days before Younique's
 21 opposition to Plaintiffs' motion for leave to disseminate notice was due,¹ the Court
 22 granted Plaintiffs' motion. (Dkt. 191.) The Order requires Younique's compliance
 23 within 10 days of the Order. (*Id.*)

24
 25 ¹ Had Younique been given the opportunity to oppose the motion to
 26 disseminate notice, Younique would have argued that Plaintiffs have not
 27 identified any claims administrator for managing class notice. Only the
 28 claims administrator should receive personal identifying information of the
 class members, and only after the administrator signs onto the protective
 order governing this matter.

1 **III. THE COURT SHOULD GRANT THIS EX PARTE APPLICATION**

2 To obtain *ex parte* relief, the “evidence must show that the moving party’s
3 cause will be irreparably prejudiced if the underlying motion is heard according to
4 regular noticed motion procedures.” *Mission Power Engineering Co. v. Continental*
5 *Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995). The moving party must also
6 show that it is “without fault in creating the crisis that requires *ex parte* relief, or that
7 the crisis occurred as a result of excusable neglect.” *Id.* Younique meets both
8 prongs of the *Mission Power* test.

9 **A. May Should Be Excluded, Mooting Class Notice**

10 Younique’s motion to exclude May is fully briefed and ready to be heard.
11 May’s Rule 26 report was due on August 1, 2018 (Dkt. 67), but Plaintiffs did not
12 serve it until December 12, 2018 (without obtaining leave of Court). As of the
13 August 1, 2018 expert report deadline, [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED] (Dkt. 146-1, Ex. C, 37:11-
18 22.) In other words, Plaintiffs asked May to delay in putting together a Rule 26
19 report because they did not want to spend money on it at the time it was due.

20 Based on May’s report alone, Younique has identified objective indicia that
21 the price premium models are not reliable as required by Fed. R. Evid. 702, as
22 indicated by [REDACTED]. (Dkt. 146, 171.) “The value of a regression
23 analysis is, to a large degree, measured by how well it describes the phenomenon it
24 is seeking to measure ... This measurement is quantified as the regression’s ‘R
25 square.’” *Valentino v. U.S. Postal Serv.*, 511 F. Supp. 917, 944 (D.D.C. 1981). [REDACTED]
26 [REDACTED]. (Dkt. 146-
27 1, Ex. C, 93:10-94:18.) May admitted that the [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]. (Dkt. 146-2, Ex. D, Report, Ex. 3; Dkt. 146-1, Ex. C, 93:10-
4 95:13.)

5 Importantly, despite the red-flag R square numbers, Plaintiffs have prevented
6 Younique from further understanding, analyzing, and fully rebutting May's models
7 by obstructing expert discovery, taking the position that Younique is *not entitled* to
8 the facts and data on which May relied in forming the opinions in his Report – even
9 though Rule 26 could not be more clear that Younique *is* entitled to this information.
10 Rule 26(a)(1) creates an affirmative duty to disclose damages information, and Rule
11 26(a)(2) mandates that expert disclosures be accompanied by the facts and data
12 considered by the expert witness. Plaintiffs failed to comply with these
13 requirements. Under Rule 37(c)(1), “If a party fails to provide information or
14 identify a witness as required by Rule 26(a) or (e), the party is not allowed to use
15 that information or witness to supply evidence on a motion, at a hearing, or at a trial
16 ...”. In other words, Rule 37(c)(1) “gives teeth” to Rule 26(a) “by forbidding the
17 use at trial of any information required to be disclosed by Rule 26(a) *that is not*
18 *properly disclosed.*” *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101,
19 1106 (9th Cir. 2001) (emphasis added).²

20 May's report, facts and information have not been properly disclosed and
21 should be excluded. Without May, Plaintiffs cannot satisfy their burden under
22 *Comcast*, meaning that the three state classes should be decertified. *Comcast Corp.*
23 *v. Behrend*, 569 U.S. 27, 38 (2013) (reversing class certification order). Excluding
24 May, therefore, would moot the need to send class notice.

25
26 ² Younique has been prejudiced by Plaintiffs' refusal to timely produce the
27 May report and refusal to produce any of the facts and data on which May
28 relied. (Dkt. 146, 171.) Without May's facts and data, Younique cannot
effectively analyze and rebut May's report.

1 **B. Notice to The Class Should be Postponed Until Class Issues Are**
 2 **Resolved**

3 It is appropriate to delay the giving of class notice until the class certification
 4 issues are resolved. *Tschudy v. J.C. Penney, Inc.*, *supra*, 2015 WL 5098446 at *6
 5 (denying motion for leave to give class notice because class issues were not yet
 6 settled) (citing 7AA Wright et al., Federal Practice and Procedure § 1788 (3d ed.)
 7 and Rubenstein, Newberg on Class Actions § 8:11 (5th ed.)).

8 Neither Plaintiffs nor class members would be prejudiced by there being
 9 certainty before class notice is given. Nor would a short delay to allow the Court to
 10 consider and rule upon the fully-brief motion to exclude May prejudice Plaintiffs or
 11 the class members.

12 In contrast, Younique would be prejudiced by the dissemination of
 13 unwarranted class notice. Younique's customer relationships will be irreparably and
 14 unjustifiably damaged. Younique relies on the goodwill of its customers to sell its
 15 products via presenter/customer-to-customer social media efforts. Class notice
 16 would irreparably undermine customers' faith in the brand. This prejudice will
 17 persist even should Younique ultimately be successful.

18 **C. Younique Had No Opportunity To Oppose Plaintiffs' Motion**

19 Younique complied with the Court's scheduling orders by timely filing the
 20 motion to exclude May. Per the Court's Trial Setting Order, motions *in limine* "will
 21 be heard on the scheduled pretrial date, unless the Court otherwise orders." (Dkt.
 22 57.) By the time Plaintiffs had served May's Rule 26 report on December 12, 2018,
 23 the motion cut-off had passed. (Dkt. 56-1.) Younique therefore properly
 24 anticipated that the motion to exclude May would be heard on February 4, 2019.
 25 (Dkt. 56-1, 57.)

26 Plaintiffs filed their motion for leave to disseminate class notice on January
 27 30, 2019, and set the hearing date for March 4, 2019. This meant that Younique had
 28 until February 11, 2019 to oppose the motion. As part of the opposition, Younique

1 would have raised its concerns as to the proposed form of notice, as well as the
2 argument noted herein that notice should be postponed until the Court has had a
3 chance to rule on Younique's motion to exclude May.

4 **IV. CONCLUSION**

5 For all the reasons set forth above, Younique respectfully requests that the
6 Court postpone enforcement of the Court's February 5, 2019 Order granting
7 Plaintiffs leave to disseminate class notice (Dkt. 191) until it has ruled on
8 Younique's motion to exclude May.

9
10 Dated: February 6, 2019

11 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

12
13 By

/s/ Abby Meyer

SASCHA HENRY

JONATHAN D. MOSS

ABBY H. MEYER

Attorneys for Defendant Younique, LLC